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ABSTRACT

The impact of government legislation and court decision on the shape of higher education in the U.S. is examined in this speech. It is noted that recent laws and court decisions concern the admission of students, their eligibility for financial aid, the protection of their rights, and the nature of the programs they enroll in, the hiring and termination of faculty, the conduct of research, and the governance of institutions by administrators and trustees. It is suggested that federal regulations often impede and subvert the educational process by stifling diversity and imposing costly, burdensome, and unnecessary requirements. Suggestions for dealing with these regulations and for preventing too much encroachment are offered. (LBH)

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IS REGULATION STRANGULATION?

by

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The question I am asked to address aptly conveys our uneasy awareness that government legislation and court decisions are increasingly influencing the shape of higher education in America. Recent laws and court decisions concern the admission of students, their eligibility for financial aid, the protection of their rights, and the nature of the programs they enroll in; the hiring and termination of faculty; the conduct of research; and the governance of institutions by administrators and trustees.

In theory, regulation imposes order and rationality on the implementation of these laws. The process of rulemaking assures that participants in Federal programs all meet identifiable standards of accountability for the use of tax dollars according to the intent of Congress.

In practice, Federal regulations too often impede and subvert the educational process by stifling diversity and imposing costly, burdensome, and unnecessary requirements.

We know this from our own experience, and from the testimony of expert witnesses.

Address at the annual Southern Regional Meeting of the College Entrance Examination Board, New Orleans, Louisiana, February 19, 1976.

Earl Cheit has observed that "review procedures, regulation, litigation and demands for information now command so much of the energies and attention of college and university officials, it is easy to forget that for most of its history higher education in the U.S. was a movement, not a bureaucracy."

James O'Hara has commented: "nowhere more than in the field of education have we seen bureaucracy run rampant."

David Mathews (before he assumed Federal office) wrote of the growing web of controls and regulations "threatening to bind the body of higher education in a Lilliputian nightmare of forms and formulas."

Kingman Brewster, warning that Federal legislation and regulations tend increasingly to prescribe educational policies, has called for vigilance against "the use of spending power as a lever to extend regulations beyond the accountability reasonably related to the purposes for which the support is given."

Summarizing such concerns in a six-page editorial, Change magazine has asked the question: "Will Government Patronage Kill the Universities?"

We all have our own reasons for validating these concerns. We can all cite examples. Some, like the initial version of the Buckley Amendment, represent bad law, passed hastily without the usual deliberative process of congressional hearings. Others, like the Guaranteed Student Loan Program regulations calling for statistical information on the salary and employment of recent graduates, represent bad regulations, reflecting an excessive zeal to substitute bureaucratic notions of consumer protection for congressional intent. In the first example, Congress undertook to establish education policy without adequate consultation with the education community affected. In the second example, it was the executive branch.

Troubling as such issues may be, we generally know how to respond to them. We deal with the education committees of the Congress and the officials

of HEW's Education Division on a daily basis; we know how to make our concerns known and we do. The Buckley Amendment, although passed in haste, was extensively amended shortly thereafter to deal with our concerns. The GSL regulation on alumni data has been modified by the Office of Education in response to our protests.

A greater danger may be the increasing burden imposed by laws and regulations which were never designed to affect higher education. Here the issues, the forums, and the actors are less familiar to us and the impact on higher education may, in fact, be entirely unintended and impossible to judge for many years.

For example, an ACE study has recently shown that the shift of Federal policy from taxing income to taxing employment which has occurred over the last 15 years has markedly depreciated the imputed tax advantage that colleges and universities have historically received from their nonprofit status. This has not come about because of any deliberate decision to dilute the tax advantage of nonprofit institutions; it just happened gradually as taxes on employment doubled from 15 to 30 percent and corporate income taxes declined from 23 to 15 percent of the Federal budget receipts. Without any conscious intent, this has significantly increased the financial squeeze on colleges and universities.

Cumulative costs have been imposed on colleges and universities by a number of other Federally-mandated social programs enacted in recent years. It is estimated that compliance with improved standards of employee safety and health promulgated by the U.S. Occupational Safety and Health Administration will cost us over $3 billion. (As someone remarked: "If you think OSHA is a small town in Wisconsin, you're in trouble.") Redesigning, remodeling, and replacing outdated academic facilities to make them more energy-efficient is estimated at over $8 billion.

The costs of other programs may eventually prove more formidable, if less direct. Who can estimate the eventual cost of training staff to the higher levels of sophistication needed to carry out administrative, record-keeping, and reporting requirements for student assistance, employee pensions, minimum wage, unemployment compensation, and other such programs?

This is not to criticize the national policy commitments embodied in these Federally-mandated programs which are fully shared by the higher education community. It is simply to point out that they often involve real costs which are difficult to estimate, but which are seldom even considered in the writing of legislation or the drafting of regulations.

If our problems with the Federal government are increasingly located in agencies, committees, and issues which are unfamiliar to us, we must enlarge our own areas of expertise, monitor legislative and executive branch activities more closely, and prepare ourselves to identify the special concerns of our constituency across the entire range of governmental activities.

Whether the Federal agencies are familiar to us or not, we must insist on a larger role for the higher education community in the development of policies which affect us. One of the first steps is to break down the wall of secrecy that has enveloped the whole process of writing regulations in recent years. As a result, proposed regulations appear in the Federal Register without warning, forcing harrassed educators to drop other duties in the scramble to submit comments before the 30-day period ends. Their efforts too often turn out to be futile, for the Federal agency which has committed its honor to specific language it has developed in secret will naturally seek to affirm the validity of its judgments by publishing final regulations with as few changes as possible.

Regulation-writing was never intended to operate in secrecy. The assumption was that the process would take place in close and continuous consultation between Federal officials and the interest groups concerned. The 30-day comment period was designed, not to freeze out constituent groups, but to give individual citizens around the country an opportunity to express their views.

Secrecy can only accentuate what former Secretary of Labor John Dunlop calls "the natural arrogance of regulators." It is difficult to imagine any issue requiring regulation of colleges and universities which could not be resolved more effectively if the entire drafting process were conducted in full consultation with the higher education community.

With advance consultation, beginning before any draft is set to paper, we could obtain a helpful understanding of what Federal officials would require of us. They, in turn, could obtain an early warning of possible difficulties which might arise in implementing such requirements. The proposed regulations when published for comment would then reflect a workable accommodation between program officials and campus administrators, and the comment period would serve to idenfity perfecting technical changes needed before final publication.

There is another, equally important reason for more consultation in advance. As able, conscientious, and committed as most Federal officials may be, they cannot be assumed to possess any special competence in the management of the educational enterprise. Their expertise lies in the administration of their programs. We should expect them to instruct us in the goals and criteria for these programs, the terms and conditions of funding, and procedures for application. But we cannot permit them to instruct us on standards of academic excellence, criteria for need analysis, or the shaping of other educational policies.

We should expect Federal officials to be expert in processing our applications with minimum delay, and seeing that our checks arrive on time. We hope that they will be sensitive to the ways in which their decisions may affect our institutions. But we cannot accept them as sources of wisdom and guidance in developing new curricula, or determining a family's ability to pay for college, or solving other problems of higher education. Otherwise, we would find ourselves looking to Washington for our solutions, and eventually beholden to a national ministry of education, dictating our standards of institutional quality and academic performance.

Generally, however, Federal officials do the best they can under difficult circumstances. The bureaucracy is not the problem; the problem is how we deal with it. Therefore, if I may imitate the bureaucrats, I would like to issue for public comment the following proposed regulations for dealing with Federal regulations:

1. Don't believe any politician who promises "deregulation." We cannot go back to "the glorious days of yesteryear," with or without the Lone Ranger. Regulation is here to stay, in a growing variety of forms. And in one respect, this fact is a tribute to the special place of higher education in our society. In its search for solutions to complex national problems, the government inevitably turns to the expertise and research capabilities of the colleges and universities. This results in the continual development of new relationships between Federal agencies and the institutions. And with each new set of relationships comes a new set of regulations.

It is not enough to blame Congress and the Federal bureaucracy for the growth of regulation. We must find ways to make it more rational.

2. Never accept any regulation as final. It is final only if we are content with it. Despite the propensity of the bureaucracy for announcing "final" deadlines for comment, there are no such things in reality. No regulation can ever be final: comments on existing regulations may be submitted--and must be considered--at any time. If regulations which cause serious difficulties remain unchanged over time, that may be our fault for failing to document our problems and propose appropriate changes.

3. We must do our homework. We have no right to complain in any case unless we know what we are complaining about. We must distinguish between the burdens of regulation and the burdens of bad law: the first can be corrected administratively; the second requires relief from Congress. Our complaints deserve to be ignored unless they pinpoint the offending language, demonstrate how it goes beyond or misinterprets the language of the law, provide factual documentation about the burdens it imposes, and suggest changes to relieve the problem.

4. We should give the Federal officials the benefit of our expertise, whether they ask for it or not. We should not be reluctant to make our case on the assumption that they know more about the issue. They may know more about the language of the regulations and the law, but they cannot know as much about how those laws and regulations affect institutional policies and programs. Therefore, never change policies or programs on the advice of Federal officials unless the changes make sense to you or your counsel. Make it your business to read and comment on proposed regulations, and the potential impact of proposed legislation. Your judgment will improve the understanding of both the bureaucrat and the congressman.

Double the effectiveness of your voice by making use of your professional association. Alert the association to your specific problem and give it your supporting data, so that it can generalize about the issue from the national perspective. Ask your association officials what they can do to help you. If they are asleep at their desks, it may be because you failed to call them.

5. We must work harder to identify, articulate, and maintain the highest standards of professional conduct and competence. Unless we do, we have little cause for complaint when Federal officials attempt to establish standards.

Perhaps the most hopeful and most challenging development in our recent struggles with the regulatory process is embodied in the Administration's legislative recommendations on institutional eligibility for student assistance programs. The proposal, submitted to Congress on February 10, would permit the Commissioner of Education to prescribe regulations on fair practices in advertising, recruiting, and enrolling students; tuition policies; and the provision of information--but only "after consultation with interested parties with respect to generally accepted standards, if any."

The significance of this language is enormous, because it completely reverses the standard bureaucratic approach to regulations. Instead of assuming that the Commissioner has the wisdom or the authority to tell college officials how to conduct their business, this wording actually does the opposite: it imposes a responsibility on the Commissioner to consult with the education community and obtain its advice on "generally accepted standards," which then must be articulated in the form of regulations.

Here lies a basis for wiser and more effective regulation, as the product of careful, open consultation in advance. This process should produce, not arbitrary Federal requirements, secretly prepared and suddenly imposed, but mutually-acceptable guidelines designed to achieve statutory goals with a minimum of inconvenience and a maximum regard for the individuals and institutions affected.

The challenge, of course, lies in the fact that "generally accepted" standards do not exist in some areas of conduct and professionalism, and we do not now have the means for inventing them or assuring their acceptance. Nevertheless we must, if we are to prevent Federal officials from establishing standards for us.

We need to develop mechanisms for deriving consensus on reasonable and acceptable standards for the administration and accounting of Federal funds, as well as standards of ethics and professionalism. We also need mechanisms for affirming and voluntarily enforcing such standards. This implies, to say the least, a willingness to change in significant respects the ways in which our pluralistic and traditionally autonomous network of institutions relate to each other and to the larger community.

Unless we are willing to make these changes of our own volition, we may never be able to simplify and rationalize the regulatory process. And one day we may interrupt our criticisms of the bureaucracy long enough to reflect like Pogo that we have met the enemy, and he is us.

Is regulation strangulation? Not if we can help it. And I believe we can.